Supreme Court, U.S.
FILED

10-642 SEP 13 2010

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

Phanendharnadh L. N. Kone,

Petitioner pro se,

v.

Virginia Department of State Police,

Respondent.

On Petition For Writ Of Certiorari
To The Virginia State Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Phanendharnadh L. N. Kone
Petitioner pro se
14325 Clemons Drive
Midlothian, VA 23114
Cell phone no.: 571-230-7438

QUESTIONS PRESENTED FOR REVIEW

During petitioner pro se, Phanendharnadh L. N. Kone's (hereinafter "Kone") employment with Department of State Police (hereinafter "DSP") in the State of Virginia, supervisors of Kone issued wrong reports and wrong notices against Kone. During Kone's employment with DSP, DSP produced forged documents and falsified documents against Kone. Without correcting the forged documents and falsified documents produced by DSP, hearing officer, EDR Director in the State of Virginia and courts in the State of Virginia issued opinions with errors which caused irreperable damage to Kone. So, questions are presented below for review in this petition for writ of certiorari.

Why did the Supreme Court of Virginia issue it's opinion under Virginia Code Ann. § 17.1-410(A)(2) and (B) quoting a wrong reason, like lack of jurisdiction, when all events in this case occurred in Richmond, Virginia?

Why did the Supreme Court of Virginia issue it's opinion under Virginia Code Ann. § 17.1-410(A)(2) and (B) **without hearing the petitioner pro se when respondent forged documents and falsified documents and evidence is in favor of petitioner pro se?**

Why did the Court of Appeals of Virginia issue it's opinion without hearing the petitioner pro

se when respondent forged documents and falsified documents and evidence is in favor of petitioner pro se?

Why did the Supreme Court of Virginia deny the petition for appeal filed by petitioner pro se, Phanendharnadh L. N. Kone, when petitioner pro se included evidence which supports petitioner pro se's petition for appeal?

Why did the Supreme Court of Virginia allow respondent to cause reperable and irreperable damage to petitioner pro se in the form of lost wages, creating problems in precise weather monitoring and creating problems in automated health care?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) of the Rules of the Supreme Court of United States, the following list identifies all of the parties appearing here and before the Virginia State Supreme Court.

The Petitioner pro se and Appellant pro se below is Phanendharnadh L. N. Kone.

The Respondent here and Appellee below is Virginia Department of State Police and Virginia Department of State Police was represented in the Supreme Court of Virginia by:

William C. Mims, Attorney General,
Maureen Riley Matsen, Deputy Attorney General,
Peter R. Messitt, Senior Assistant Attorney General,
Ronald N. Regnery, Senior Assistant Attorney General, Lead Counsel of record for the Department of State Police
900 East Main Street
Richmond, Virginia 23219
Telephone: 804-786-5632
Fax: 804-372-2087
e-mail: rregnery@oag.state.va.us

The names and addresses of respondents from Virginia Department of State Police, EDR and hearing officer are:

Sergeant Brian K. Blackman,
Captain Edward L. Hope, Jr.,

Elaine C. Shepherd,
Mark T. Holland,
Abhishek Ghosh,
Alex Piven,
c/o Department of State Police
Information Technology Division
7700 Midlothian Pkwy.
Richmond, VA – 23235

Captain Timothy R. Evans
Agency Representative
Virginia State Police
Bureau of Criminal Investigation
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OPINION BELOW

The memorandum opinion per curiam of the Virginia State Court of Appeals is not designated for publication. This opinion is reprinted in the Appendix hereto, App. 1 - App. 5. The order dismissing the petition for appeal is reprinted in the Appendix hereto, App. 6 - App. 7. The order denying the petition for rehearing is reprinted in the Appendix hereto, App. 8 - App. 9. The order (with striken words) from the Circuit Court for the County of Chesterfield, releasing the $500.00 bond is reprinted in the Appendix hereto, App. 10 - App. 11.

BASIS FOR SUPREME COURT JURISDICTION

The Supreme Court of Virginia entered it's Opinion on April 9, 2010. App. 6 to App. 7. Petitioner pro se timely sought rehearing, and the Supreme Court of Virginia denied that petition on June 17, 2010. App. 8 – App. 9. The Circuit Court for the County of Chesterfield issued it's order releasing the $500.00 bond posted by plaintiff pro se to perfect his appeal to the Court of Appeals of Virginia on August 3, 2010. App. 10 – App. 11. Petitioner pro se now seeks review of that Opinion on a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. § 1257 to review on a writ of certiorari the opinion of the highest court of a State.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

Due Process Clause of the United States Constitution, Fourteenth Amendment, U.S. Const. Amend. XIV, § 1:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ...

Virginia State Policy of the Commonwealth; responsibilities of state agencies under this chapter, Virginia Code Ann. § 2.2-3000(A):

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate

and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

STATEMENT OF THE CASE

A. Summary of Facts

During petitioner pro se, Phanendharnadh L. N. Kone's (hereinafter "Kone") employment with Department of State Police (hereinafter "DSP"), supervisors of Kone issued wrong reports and wrong notices against Kone. During Kone's employment with DSP, DSP produced forged documents and falsified documents.

Kone realized that his supervisors are not competent and probably not qualified to assess his technical skills. Captain Edward L. Hope, Jr. (hereinafter "Hope"), Elaine C. Shepherd (hereinafter "Shepherd") and Mark T. Holland (hereinafter "Holland") were Kone's supervisors at DSP. Kone requested his supervisors to withdraw wrong reports and wrong notices which were issued against him. Kone did not receive any proper response from his supervisors.

Kone was always truthful and sincere to his duties. On the contrary DSP submitted forged documents and falsified documents and DSP's

decisions were not based on opinions from experts.

B. Course of Proceedings Below

Kone filed grievance form A of Department of Employment Dispute Resolution (hereinafter "EDR") as per employee grievance procedure. On October 20, 2008, Kone advanced his grievance to hearing. On December 16, 2008, a hearing was held at the DSP's location. William S. Davidson (hereinafter "Davidson") was the hearing officer for the hearing which took place on December 16, 2008. During the hearing on December 16, 2008, Kone mentioned that DSP produced falsified documents and Kone proved that his supervisors were not competent to assess Kone's skills. On the day of hearing i.e. December 16, 2008, all witnesses from Department of State Police failed to substantiate their allegations with source code and best practices in information technology. All allegations from Department of State Police are vague. On the day of hearing, all witnesses from Department of State Police were silent or ignorant about the best practices or standards in information technology.

Hearing officer failed to test and verify the credentials of witnesses submitted by Department of State Police. Witnesses submitted by the Department of State Police are not qualified and competent to assess the performance of Kone.

The hearing on December 16, 2008, was

recorded in two audio tapes. On December 16, 2008, Kone was placed on leave with pay. On December 23, 2008, Davidson issued his decision. Davidson's remarks about Kone's performance is not based on any expert's opinion or expert committee's review. Davidson's decision is silent about the importance or significance of Kone's supporting documentary evidence. Kone's supporting documentary evidence was not heard in the hearing.

On January 14, 2009, EDR received a letter from Kone. From this letter Kone requested administrative review of the hearing officer's decision. The ruling of EDR Director was silent about the forged documents and falsified documents which were submitted by DSP.

Pursuant to Virginia Code Ann. § 2.2-3006(B) Kone appealed the hearing officer's decision in the Circuit Court of Chesterfield County. Kone's appeal in the Circuit Court of Chesterfield County was dismissed. Pursuant to Rule 5A:6 of the Rules of the Supreme Court of Virginia Kone appealed from the final order of the Circuit Court of Chesterfield County in the Court of Appeals of Virginia. From a memorandum Opinion per curiam on November 24, 2009, Court of Appeals of Virginia summarily affirmed the decision of the trial court. Kone's petition for rehearing en banc was denied on December 23, 2009, by the Court of Appeals of Virginia. Pursuant to Rule 5:17 of the Rules of the Supreme Court of Virginia Kone timely appealed

the Opinion of the Court of Appeals of Virginia which was denied for lack of jurisdiction. Pursuant to Rule 5:20 and Rule 5:20A of the Rules of the Supreme Court of Virginia Kone timely requested a rehearing which was denied.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Kone, provided a list of twenty two documents to the Court of Appeals of Virginia, in his Petition to Rehear En Banc. The list of twenty two documents is the list of forged documents and falsified documents produced by DSP. The memorandum opinion per curiam on November 24, 2009, from the Court of Appeals of Virginia is contradictory to the evidence. App. 1 – App. 5.

In the memorandum opinion per curiam from the Court of Appeals of Virginia it is written as given below (App. 2):

> Upon reviewing the record and briefs of the parties, we conclude that this appeal is without merit. Accordingly, we summarily affirm the decision of the trial court. See Rule 5A:27.

But the Court never reviewed the records belonging to the petitioner pro se. The records of petitioner pro se were present in the hard drives of petitioner pro se's computer and shared drives of

respondent. They had valuable information created by petitioner pro se for precise weather monitoring with correct future predictions, and automated healthcare. They also contain scripts, code and quality control reports generated by petitioner pro se. Petitioner pro se corrected many programs written by respondent.

In the memorandum opinion per curiam from the Court of Appeals of Virginia it is written as given below (App. 4):

> In the document appellant filed in the trial court entitled "Reply to Agency's Memorandum of Law in Opposition to Grievant's Appeal," appellant stated, generally, "[t]he decision of [the] hearing officer is 'contradictory to law.'" However, appellant did not "specify how that decision [was] 'contradictory' to law and what 'law' [was] thereby being contradicted."

But petitioner pro se, Phanendharnadh L. N. Kone, already informed Court that the hearing officer relied on the forged and falsified documents which were created by respondent. Hence, the decision of the hearing officer is contradictory to law.

In the memorandum opinion per curiam from the Court of Appeals of Virginia it is written as given below (App. 4 – App. 5):

> In addition, the issues appellant raised on appeal to the trial court involved evidentiary materials, witness competency and credibility matters, and the hearing officer's findings of fact, all of which were beyond the scope of review of the trial court pursuant to Code § 2.2-3006(B).

But, under Virginia Code Ann. § 2.2-3006(B) the Court can reverse the decision of the hearing officer. Virginia Code Ann. § 2.2-3006(B) does not restrict or limit Courts to obtain opinions from experts. Under Virginia Code Ann. § 2.2-3006(B) the Court can obtain opinions from experts or reverse the decision of hearing officer.

In the memorandum opinion per curiam from the Court of Appeals of Virginia it is written as given below (App. 5):

> "[B]ecause [appellant] failed to identify any applicable law that was contradicted by the hearing officer's decision, [appellant]'s appeal to the circuit court failed from its inception."

But, under Virginia Code Ann. § 2.2-3006(B) Court can reverse the decision of hearing officer. Court can punish respondents under Virginia Code Ann. § 18.2-168 for forging public records and Court can punish respondents under Virginia Code

Ann. § 18.2-472 for false entries by respondents. So, petitioner pro se, Phanendharnadh L. N. Kone, did identify all applicable laws. Surprisingly, Court never heard petitioner pro se but gave it's opinion with errors which can cause irreperable damage.

Kone produced substantial evidence of the unreasonableness of the respondent. Kone was deprived of all research and practical use of systems and software in public safety, precise weather monitoring, health care etc., and has been discriminated against. Without further detailing the evidence it is clear that Kone has produced substantial evidence of the unreasonableness of the respondent, hearing officer and EDR Director. DSP produced no evidence of the reasonableness of it's action. In fact the only evidence that respondent introduced was the falsified documents and forged documents. Therefore the reasonableness of the respondent's action is not fairly debatable. If Kone's petition is not granted than there is no assurance that DSP will not repeat the practice of forging documents or falsifying documents against Kone or anyone.

CONCLUSION

For all the foregoing reasons, Petitioner pro se, Phanendharnadh L. N. Kone, respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

Phanendharnadh LN Kone

Phanendharnadh L. N. Kone
Petitioner pro se
14325 Clemons Drive
Midlothian, VA – 23114
Cell phone no.: 571-230-7438

App. 1

COURT OF APPEALS OF VIRGINIA

Present: Judges Frank, Alston and Senior Judge Coleman

PHANENDHARNADH L. N. KONE

MEMORANDUM OPINION*

v. Record No. 0974-09-2 PER CURIAM

NOVEMBER 24, 2009

VIRGINIA DEPARTMENT OF STATE POLICE

FROM THE CIRCUIT COURT OF CHESTERFIELD COUNTY
Michael C. Allen, Judge

(Phanendharnadh L. N. Kone, *pro se*, on briefs).

(William C. Mims, Attorney General; Maureen Riley Matsen, Deputy Attorney General; Peter R. Messitt, Senior Assistant Attorney General; Ronald N. Regnery, Senior Assistant Attorney General, on brief), for appellee.

Phanendharnadh L. N. Kone, appellant, appeals a decision of the trial court affirming the decision of the hearing officer under the grievance procedure for state employees and dismissing appellant's appeal thereof. On appeal, appellant argues: (1) the trial court erred by not finding that

*Pursuant to Code § 17.1-413, this opinion is not designated for publication.

the hearing officer's decision was contradictory to law; (2) numerous documents admitted at his hearing were forged or falsified; and (3) his supervisors at the Virginia Department of State Police (VDSP) were not qualified or competent to assess his skills. Upon reviewing the record and briefs of the parties, we conclude that this appeal is without merit. Accordingly, we summarily affirm the decision of the trial court. See Rule 5A:27.

Appellant was formerly employed by the VDSP as a senior programmer/analyst. After receiving complaints about his work, appellant's supervisors met with him on several occasions to discuss his work performance issues. In August 2008, appellant received a Group II Written Notice for "[f]ailure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy."

Appellant challenged the issuance of the Group II Written Notice through the state employee grievance procedure. See Code § 2.2-3000 *et seq.* After an evidentiary hearing, the hearing officer found the VDSP met its burden of proof regarding the issuance of the Group II Written Notice. Appellant requested reconsideration of the hearing officer's decision, which was denied.

Appellant appealed his case to the trial court. In its order entered on April 8, 2009, the trial court found that appellant had "failed to

reference, cite and/or otherwise identify any statute (and/or other legislation), judicial precedent and/or accepted legal principle in support of his claim that the decision of the hearing officer was 'contradictory to law' – as required by Code § 2.2-3006(B) for the reversal of that decision." The trial court dismissed the appeal and affirmed the decision of the hearing officer. Appellant appealed the trial court's decision to this Court.

> [A] party appealing from a hearing officer's decision to a circuit court is required to "specify how that decision [was] 'contradictory' to law and what 'law' [was] thereby being contradicted." The appealing party must "identify [a] constitutional provision, statute, regulation or judicial decision which the [hearing officer's] decision contradicted."

Virginia Polytechnic Inst. and State Univ. v. Quesenberry, 277 Va. 420, 429, 674 S.E.2d 854, 858 (2009) (citations omitted).

> The General Assembly has articulated a very narrow standard of review to be applied by the circuit court in such appeals. Because this standard focuses solely on the question whether the hearing officer's decision is contradictory to any applicable law,

> the party appealing the hearing officer's decision properly bears the burden of identifying the law thereby contradicted.

Id.

"'Law' is the 'aggregate of legislation, judicial precedents and accepted legal principles.'" Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 446, 573 S.E.2d 319, 323 (2002) (quoting Black's Law Dictionary 889 (7th ed. 1999)).

In the document appellant filed in the trial court entitled "Reply to Agency's Memorandum of Law in Opposition to Grievant's Appeal," appellant stated, generally, "[t]he decision of [the] hearing officer is 'contradictory to law.'" However, appellant did not "specify how that decision [was] 'contradictory' to law and what 'law' [was] thereby being contradicted." Quesenberry, 277 Va. at 429, 674 S.E.2d at 858 (quoting Tatum v. Virginia Dep't of Agric., 41 Va. App. 110, 122, 582 S.E.2d 452, 458 (2003)). As in Quesenberry, appellant "failed to identify to the trial court any applicable constitutional provision, statute, regulation, or court precedent of this Commonwealth that the hearing officer contradicted." Id.

In addition, the issues appellant raised on appeal to the trial court involved evidentiary materials, witness competency and credibility matters, and the hearing officer's findings of fact,

all of which were beyond the scope of review of the trial court pursuant to Code § 2.2-3006(B). "[T]he only grounds of appeal of the hearing officer's decision is 'that the determination is contradictory to law.'" Barton, 39 Va. App. at 445, 573 S.E.2d at 322 (quoting Code § 2.2-3006(B)). The hearing officer's decision is final and binding 'if consistent with law and policy.' Code § 2.2-3005.1(C)(iii)." Quesenberry, 277 Va. at 428, 674 S.E.2d at 858. "[B]ecause [appellant] failed to identify any applicable law that was contradicted by the hearing officer's decision, [appellant]'s appeal to the circuit court failed from its inception." Id. At 430, 674 S.E.2d at 859.

Appellant also requests that we remand this case to the trial court for an award of costs pursuant to Code § 2.2-3006(E). Code § 2.2-3006(E) provides that a court shall award an employee reasonable attorney's fees and costs if the employee "substantially prevails on the merits of a case brought under subsection B or D." Appellant has not substantially prevailed on the merits of the case. Therefore, we deny appellant's request.

Accordingly, we summarily affirm the decision of the trial court. See Rule 5A:27.

Affirmed.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 9th *day of* April, 2010.

Phanendharnadh L. N. Kone, Appellant,

against Record No. 100154
Court of Appeals No. 0974-09-2

Department of State Police, Appellee.

From the Court of Appeals of Virginia

The Court dismisses the petition for appeal filed in the above-styled case for lack of jurisdiction. Code § 17.1-410(A)(2) and (B).

Justice Mims took no part in the consideration of this case.

A Copy,

Teste:

Patricia L. Harrington, Clerk

App. 7

By: /s/

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 17th day of June, 2010.

Phanendharnadh L. Kone, Appellant

against Record No. 100154
Court of Appeals No. 0974-09-2

Department of State Police, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 9th day of April, 2010 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Mims took no part in the consideration of this case.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: *original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court*

Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF CHESTERFIELD

Phanendharnadh L. N. Kone,	)
Plaintiff,	)
	)
v.	) **Case No. CL09-498**
	)
Virginia Department of State Police,	)
Defendant.	)

ORDER

It appearing to the Court that a bond in the amount of $500.00 was posted by ~~Defendant~~ Plaintiff to perfect his appeal to the Court of Appeals of Virginia, and that the Court of Appeals denied ~~Defendant's~~ Plaintiff's Petition for Rehearing. It further appearing to the Court that Supreme Court ended the matter by denying the Defendant's Petition, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Clerk of this Court shall release the $500.00 bond posted by ~~Defendant~~ Plaintiff to perfect his appeal to the Court of Appeals of Virginia.

Signatures of the parties are waived pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia. Let the Clerk forward an attested copy of this Order to the parties.

ENTER: 8/3/2010

/SEAL/ /s/

Michael C Allen, Judge

A COPY TESTE:
JUDY L. WORTHINGTON, CLERK

BY /s/
DEPUTY CLERK

Supreme Court, U.S.
FILED

10-642 SEP 13 2010

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No. _____

In The
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PHANENDHARNADH L. N. KONE,

Petitioner pro se,

v.

VIRGINIA DEPARTMENT OF STATE POLICE,

Respondent.

On Petition For Writ Of Certiorari
To The Virginia State Supreme Court

SUPPLEMENTAL APPENDIX

PETITION FOR A WRIT OF CERTIORARI
SUPPLEMENTAL APPENDIX

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[1] This Supplemental Appendix is in addition to the Appendix at the end of the Petition for a Writ of Certiorari and is denoted as "a2".

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December 23, 2008

Fax #: 703-323-2365	Fax #: n/a
Captain Timothy R. Evans Agency Representative Virginia State Police Bureau of Criminal Investigation 9801 Braddock Road Fairfax, VA 22032	Mr. Phanendharnadh Kone Grievant 3509 Kady Brooke Place Glen Allen, VA 23060

Re: Grievance of Phanendharnadh Kone
v. Virginia State Police
Case number: 8985

Dear Captain Evans and Mr. Kone:

Attached please find my Decision in the above-referenced matter. Should either of you have any questions, please contact me.

Yours very truly,

/s/ ?????

William S. Davidson

WSD/jm
Enclosure

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8985

Hearing Date: December 16, 2008
Decision Issued: December 23, 2008

PROCEDURAL HISTORY

The Grievant received a Group II Written Notice on August 19, 2008 for:

> Since December, 2007, you have failed to perform/complete assigned work to include, but not limited to, Firearms v1.7 release, Human Resources Alternative Work Schedule Management (AWSM), and Department of Motor Vehicles Safety Net Project in a satisfactory manner. Also, since December, 2007, you have failed to follow your supervisor's instructions regarding these assignments by not completing them in accordance with established development standards (JAVA Enterprise Edition STRUTS). I am combining these two offenses into a single offense which be considered a

Group II offense under General Order 19, Paragraph 13.b.(1) of the State Police Manual for "Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy."

Pursuant to the Group II Written Notice, the Grievant had this Written Notice placed in his file. The Grievant timely filed a grievance to challenge the Agency's actions. On November 20, 2008, the Department of Employment Dispute Resolution (EDR") assigned this Appeal to a Hearing Officer. On December 16, 2008, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Agency Advocate
Grievant
Witnesses

ISSUE

1. Did the Grievant fail to follow a supervisor's instructions and to perform assigned work or otherwise comply with applicable established written policy?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance bearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 resides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they

constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM §9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing eight (8) tabbed sections and that binder was accepted in its entirety as Agency Exhibit I .

The Grievant provided the Hearing Officer with a spiral binder containing nine (9) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

The Grievant is a senior programmer/analyst for the Agency. In that capacity, he was expected to be able to initiate technology projects, to help establish the parameters of the project and to be involved in the actual programming for the project. Commencing in October or

November of 2007, the Grievant's supervisors began receiving complaints regarding his job performance. Pursuant thereto, the Grievant met with his immediate supervisor and that supervisor's supervisor to discuss performance issues. Those discussions entailed the Grievant's expansion of the scope of work assignments unnecessarily and his failure to follow instructions from his supervisors regarding programming and other tasks.[1] The Grievant was given a Notice of Improvement Needed/Substandard Performance Notice, dated December 20, 2007.[2]

On April 7, 2008, the Grievant met with the

same two supervisors to discuss his continuing expansion of the scope of work assignments without authorization, his failure to follow the instructions of his supervisor regarding programming, his failure to follow up with his supervisor when the task was completed or he encountered difficulties and his failure to complete assignments on schedule.[3] Pursuant thereto, he received a second Notice of Improvement Needed/Substandard Performance Notice.[4]

On May 8, 2008, the Grievant again met with his immediate supervisor regarding his inability to perform his tasks in a timely and competent manner. At this time, his thirty (30) day Performance Plan of April 7, 2008 was extended until Friday, May 30, 2008. The Grievant was put on Notice that if his performance did not improve to at least a contributor level, then his employment would be terminated.[5]

The Hearing Officer heard testimony from several Agency witnesses who worked with the Grievant and all unanimously concurred that the Grievant did not perform his work in a timely fashion and often attempted to expand the scope of his work beyond the specific instructions that he had been given. Within the Agency's evidence are numerous examples of the Grievant's work performance where he was unable to complete his work in even a remotely timely fashion. When the Grievant testified, it appeared that he simply

felt that the Agency was asking him to perform his tasks in a way that was contrary to the way that he, not the Agency, thought the task should be performed. The Grievant seemed incapable of understanding that the Agency determines what the scope of the assignment is and how it is to be carried out. Accordingly, the Hearing Officer finds that the Grievant has violated Agency General Order I 9, Paragraph 13.b.(1), wherein he has failed to follow his supervisor's instructions and he has failed to perform assigned work or otherwise comply with established written policy.[6]

---

[1] Agency Exhibit 1, Tab 4, Sub-tab "12/20/2007 Performance Plan (90 day)," Page 1

[2] Agency Exhibit 1, Tab 4, Sub-tab "12/20/2007 Performance Plan (90 day)," Page 2

[3] Agency Exhibit 1, Tab 4, Sub-tab "4/7/2008 Performance Plan (30 day)," Page 1

[4] Agency Exhibit 1, Tab 4, Sub-tab "4/7/2008 Performance Plan (30 day)," Page 2

[5] Agency Exhibit 1, Tab 4, Sub-tab "5/8/2008 Performance Plan Extension," Page I

[6] Agency Exhibit 1, Tab 2, Page 8

MITIGATION

Va. Code § 2. 2-3005.I authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..." [7] Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency's discipline only if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Agency clearly considered the fact that the Grievant has no prior disciplinary

actions for mitigation.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency did meet its burden of proof regarding the issuance of a Group II Written Notice.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the Hearing Officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource

Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

---

[7] Va. Code § 2.2-3005

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main Street, Suite 301
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[8] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[9]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR'S toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

/s/ ?????
William S. Davidson
Hearing Officer

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[8] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[9] Agencies must request and receive prior approval from the Director of EDR before filing a

notice of appeal.

15-a2

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MAILING ADDRESS:
POST OFFICE BOX K-200
RICHMOND, VIRGINIA 23288

January 8, 2009

Fax #: 703-323-2365	Fax #: n/a
Captain Timothy R. Evans Agency Representative Virginia State Police Bureau of Criminal Investigation	Mr. Phanendharnadh Kone Grievant 3509 Katy Brooke Place Glen Allen, VA 23060

9801 Braddock Road Fairfax, VA 22032	

Re: Grievance of Phanendharnadh Kone
v. Virginia State Police
Case number: 8985

Dear Captain Evans and Mr. Kone:

Please find attached the Hearing Officer's Decision regarding reconsideration in the above-referenced case.

Should you have any questions, please contact me.

Yours very truly,

/s/ ?????
William S. Davidson

WSD/jm

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8985

Hearing Date: December 16, 2008
Decision Issued: December 23, 2008

Reconsideration Request Received: January 5, 2009
Response to Reconsideration: January 8, 2009

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review. A request for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence

of incorrect legal conclusions is the basis for such a request.[1]

OPINION

The Grievant seeks reconsideration of the Hearing Officer's decision based on newly discovered evidence and the allegation of an incorrect legal conclusion in the Hearing Officer's original Decision. The Grievant offers as newly discovered evidence six (6) potential documents and/or entries which are to be found on the hard drive of his desktop computer. The Grievant does not actually have these documents but in his request for reconsideration, he states that, all of these documents, "can be located from the desktop computer which was in the office [of the Grievant] before the hearing date, December 16, 2008."

The use of after discovered or newly discovered evidence that was not available at the time of the trial or hearing is a concept that has been well-discussed and defined by the Courts of the Commonwealth of Virginia. A motion to reconsider or to grant a new trial based on newly discovered evidence is a matter submitted to the sound discretion of the Circuit Court (herein the

---

[1] §7.2 Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual,

effective August 30, 2004.

"Hearing Officer") and will be granted only under unusual circumstances after particular care and caution has been given to the evidence.[2]

A moving party's burden of proof before the Circuit Court based on newly discovered evidence is well established. The moving party must establish that such evidence:

> (1) Appears to have been discovered subsequent to the trial; (2) could not have been secured for use at the trial in the exercise of reasonable diligence by the movant; (3) is not merely cumulative, corroborative or collateral; and (4) is material, and such as should produce opposite results on the merits of another trial.[3]

The Director of EDR issued an opinion on October 9, 2008 regarding new evidence. In that opinion, the Director held in part as follows:

> ...Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence." Newly

> discovered evidence that was ii: existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended. However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party must show that
>
> > (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[4]

The Grievant has made no reasonable proffer to the Hearing Officer as to why this evidence could not have been secured prior to the hearing. Indeed, the Grievant affirmatively states that all of this evidence was contained within the memory of his desktop computer prior to the hearing date of December 16, 2008. Accordingly, not only was the Grievant aware of

this evidence, but the Grievant affirmatively chose not to produce this evidence at the hearing.

Accordingly, there is no basis for the Hearing Officer to reconsider his opinion.

---

[2]Commonwealth v. Tweed, 264 Va. 524, 528, 570 S.E. 2d 797, 800 (2002); Stockton v. Commonwealth, 227 Va. 124, 149, 314 S.E. 2D 371, 387 (1984).

[3]Odum v. Commonwealth, 225 Va. 123, 130, 301 S.E. 2D 145, 149 (1983).

[4]Administrative Review of Director, Ruling No. 2009-2110, dated October 9, 2008, Page 4.

DECISION

The newly discovered evidence, for which the Grievant requested that the Hearing Officer re-open the hearing, is and was not newly discovered evidence. The Grievant was in possession of this evidence prior to the original hearing and was aware of its existence prior to the original hearing. The Hearing Officer concludes that there is no basis to change the Decision issued on December 23, 2008.

APPEAL RIGHTS

A Hearing Officer's original decision becomes a final hearing decision, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the Hearing Officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.[5]

/s/ ?????
William S. Davidson
Hearing Officer

---

[5] An appeal to circuit court may be made only on the basis that the decision was

contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

VIRGINIA:

IN THE CIRCUIT COURT OF
CHESTERFIELD COUNTY

PHANENDHARNADH L. N. KONE,

Grievant/Appellant,

v. Case No.: CL09-498

VIRGINIA DEPARTMENT OF STATE POLICE,

Agency/Appellee.

FINAL ORDER

This matter came before the Court on April 1, 2009, at or about 11:00 a.m., as an appeal of a decision of a hearing officer under the Grievance Procedure for State Employees pursuant to Virginia Code § 2.2-3006(B). At the hearing, the Grievant/Appellant, Mr. Phanendharnadh L. N.

Kone, appeared pro se and the Agency/Appellee, the Virginia Department of State Police, was represented by undersigned counsel.

Having reviewed the record and considered the arguments of the parties and/or counsel, the Court finds that the Grievant/Appellant has failed to reference, cite and/or otherwise identify any statute (and/or other legislation), judicial precedent and/or accepted legal principle in support of his claim that the decision of the hearing officer was "contradictory to law" - as required by Virginia Code § 2.2-3006(B) for the reversal of that decision.

Accordingly, it is hereby ADJUDGED, ORDERED and DECREED that this appeal is DISMISSED and that the decision of the hearing officer in Grievance Case No. 8985 (issued

December 23, 2008) is AFFIRMED.

Pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the endorsement of the Grievant/Appellant is hereby dispensed with.

The Clerk is hereby directed to send a certified copy of this Final Order to all counsel of record and pro se parties upon entry hereof.

Entered this 8th day of APRIL, 2009

/s/ _____
JUDGE

I ASK FOR THIS:

/s/ _____
Ronald N. Regnery (VSB #37453)
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

(804) 786-5632
(804) 372-2087 (facsimile)
Counsel for Agency/Appellee
Virginia Department of State Police

All purposes of the instant cause having been accomplished, the Court does further ORDER that the matter be stricken from the active docket of this Court and filed among the ended causes.

A COPY TESTE:
JUDY L WORTHINGTON, CLERK
/s/ BY_____
DEPUTY CLERK

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

PHANENDHARNADH L. N. KONE,
Grievant/Appellant

vs. CL09-498

VIRGINIA DEPARTMENT OF STATE POLICE,
Agency/Appellee

June 29, 2009

Chesterfield, Virginia

Complete transcript cf the testimony and other incidents, when heard before the Honorable Micheal C. Allen, beginning at 9:00 a.m.

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Richmond, Virginia 23233
(804) 359-1984

APPEARANCES:

Phanendharnadh L. N. Kone, pro se

Ronald N. Regnery, Esquire
Commonwea1th of Virginia
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
804.786.5632
Counsel for the agency/appellee

(The court reporter was duly sworn.)

THE COURT: All right. The record should reflect that we are convened in the matter of Kone versus Department of State Police. This is a

matter

in which the appellant, Mr. Kone – if I'm pronouncing that correctly?

MR. KONE: Yes, that's correct.

THE COURT: -- appealed from an administrative decision of a hearing officer. He had challenged the determination of the State Police to terminate his employment with that agency. After the hearing officer found in favor of the State Police, he appealed to this court. There was a motion to dismiss his appeal filed. That was heard on April

the 1st of this year, and the Court sustained that motion to dismiss, noting his exception. A final order in the matter reflecting that ruling was entered on April the 8th of this year.

Mr. Kone now seeks to appeal from the decision of this Court. There was not a court reporter present on April 1st, and therefore there was no transcript made of that proceeding. Mr. Kone seeks to proceed under Rule 5:11 by filing a statement of facts, and he has filed what purports to

be a statement of facts. And there are objections to that statement that have been filed by the Office of the Attorney General.

We are here today so that the Court can make a determination on this matter. I note that Rule 5:11(c) -- excuse me, (d) applies here. And according to this rule, when an objection to a proposed statement of facts is filed, as is the case here, the Court is to have a hearing, which we are

doing this morning, and shall overrule the objections or make any corrections that the Court deems necessary or add whatever additions are needed to make the record complete or to certify the manner in which the record is incomplete and sign the transcript of the statement.

Mr. Regnery, are you ready to proceed on your motion -- on your objection?

MR. REGNERY: Yes, Your Honor.

THE COURT: All right. Mr. Kone, are you ready to proceed this morning?

MR. KONE: Yes.

THE COURT: Mr. Regnery. And I'll begin by asking you whether, given the language of the rules I've just recited, there is a provision that allows the Court to sustain the objection. That's not one

of the alternatives listed in the explicit language, at least in the rule.

MR. REGNERY: Yes, Your Honor, I noted that. But I think that the – the kind of particular nature

of these grievance appeals and how the role of the circuit court is essentially – in a normal setting, the circuit court is the trial level body, it hears evidence, makes evidentiary rulings, there is a decision by the jury or Your Honor. However, in these proceedings the – really, the trial level, so to speak, is done by the hearing officer, and he's the one or she's the one who – who hears the evidence, makes the ruling, and essentially this

court is more of the first level of the appellate review, as I read the procedure, because of the unique standard that the Court is operating under, whether or not the hearing officer's decision is contradictory to law. This court does not have the authority, as we argued before, to determine whether evidentiary rulings were mistaken or factual findings were supported or nonsupported.

So I think that if there is an issue here about the transcript, I think the transcript at

issue

24 and I think the one that Mr. Kone was referring to is

25 not the transcript of our hearing on April 1st, but

1 more the transcript of --

2 THE COURT: The proceedings before the

3 hearing officer.

4 MR. REGNERY: Right. And that's what he

5 cites from in his statement of facts. And there --

6 the Virginia State Police, who I represent this

7 morning, have noted essentially two

objections to
that. First of all, is that, again looking at the unique nature of the statute and the standard being
contradictory to law, whether any of the facts or
evidentiary rulings of the hearing officer are relevant at all to the circuit court's review under
2.2-3000(6)(B) or whether – and thus whether the
Court of Appeals can look at that. And we've made an
objection saying that the facts are essentially
irrelevant here. But even if the Court were to find

that the transcript does have some relevance, that is preserved in total in the audiotapes that have been provided to the Court as part of the grievance of record.

THE COURT: So what you're saying is that there is no written statements of facts necessary in this case because it can be determined or reviewed by the court or by the appellate court on the record and that the order reflecting the decision to sustain

your motion to dismiss the appeal sufficiently captures this court's role in the proceedings.

MR. REGNERY: Correct, Your Honor. And what – what the provision says, it says in lieu of a transcript --

THE COURT: Right.

MR. REGNERY: -- there can be written statement of facts.

THE COURT: Right.

MR. REGNERY: And here we have a transcript, so there is really no need to have it in lieu of

anything because we have the audiotapes. And that --

THE WITNESS: The only proceedings before this court were the arguments on the motion to dismiss which were heard April 1st and which are memorialized in the April 8th order.

MR. REGNERY: Yes, Your Honor. And those are essentially just arguments of law. There are no factual arguments made. So, to the extent Mr. Kone wants to argue the facts as the hearing officer

decided them, and --

THE COURT: He has an adequate record from which to do so.

MR. REGNERY: He does. And clearly those tapes have been made a part of the record. And in

fact, I will note that Mr. Kone himself states in one of his pleadings in coming up with his written statement of facts, he listened to those tapes. So he's basing the statement of facts on those tapes

himself.

THE COURT: Thank you.

Mr. Kone, would you like to be heard?

MR. KONE: Yes, Your Honor.

THE COURT: You understand the points made by the --

MR. KONE: Yes. Yes, Your Honor.

THE COURT: -- assistant attorney general?

MR. KONE: Yes. What the counsel of Department of State Police wants to say is all decisions taken by the hearing officer based on Virginia Code 2.2-3000(6)(B) for this morning's purpose --

THE COURT: What he's saying is that

you
19 have a transcript in the form of those recordings
20 that is already a part of the record, so there is
21 really no need for a statement of facts as to what
22 occurred in this court. There was no evidentiary
23 hearing in this court. There were no witnesses who
24 testified. All this court considered was the legal
25 issue raised in the attorney general's office move to

dismiss your appeal. And those arguments are and the Court's decision on those arguments are reflected in the order that was entered here April the 8th. So there is already a record. And to the extent you wish to argue about factual determinations, you're arguing based on the facts decided by the hearing officer in those proceedings.

You understand that that's the point being made here?

MR. KONE: Yes, Your Honor. Here

what I want to add is in the decision from the hearing officer in the earlier matter, it clearly cite that the grievant, that is Phanendharnadh Kone, can appeal. So that --

THE COURT: I understand. I understand you disagree with the legal determination that the Court made.

MR. KONE: Yes.

THE COURT: But that legal determination is adequately reflected in the record already

in the
21 form of the order that was entered April the 8th. So
22 there is no need for an additional statement of
23 facts. There was not a factual finding made in this
24 court, there was a legal determination to dismiss
25 your appeal.

1 MR. KONE: The statement of facts is
2 specific to my case and to make things more clearer
3 to the Court of Appeals.
4 THE COURT: But your case, you're

commenting
on the determinations made by the hearing officer,
and then you object to this Court's legal decision to
dismiss your appeal from that hearing officer. And
those matters are memorialized already in the
existing court record.

MR. KONE: The determinations made by the
hearing officer.

THE COURT: Yes.

MR. KONE: Someone should say whether
they're right or wrong, and the Court has the

authority to say that.

THE COURT: I understand that is your position.

MR. KONE: Since the beginning, the counsel for Department of State Police was objecting the code to review and to find the actual facts present in the hearing officer's decision. And he was objecting to say that the comments or facts presented in the hearing officer's decision is true or false. And the Court has the authority to decide whether what is

said in the determination of the hearing officer is

true or false. And also the hearing officer himself in the earlier matter clearly said that their decision is appealable. So obviously this court has the authority and can determine.

THE COURT: I understand you object to this, you believe this court should have reviewed the evidentiary findings --

MR. KONE: Yes.

THE COURT: -- of the hearing officer.

MR. KONE: Yes.

THE COURT: And you have made that point and that is reflected in the record.

MR. KONE: Which you may recall, Your Honor, is not reflected in the record because the final order says that -

THE COURT: Well, you have -- perhaps I should rephrase it. You have the hearing officer's recording so that that record that you challenge --

MR. KONE: Yes.

THE COURT: -- is before the Court of Appeals already. It's in the file, the

recordings of

22 the hearing officer's proceedings.

23 MR. KONE: Okay.

24 THE COURT: So to the extent that you're

25 asking the hearing officer to overturn this court's

1 decision and you want to be able to refer – excuse

2 me, you're asking the appellate court to overturn

3 this Court's decision and you're going to ask the

4 appellate court to review those findings and allow

you to comment on them, you already have a record that enables you to do that because you have the recordings of the hearing officer.

MR. KONE: Okay. Then what I should --

THE COURT: And you have this Court's order granting the motion to dismiss that was filed by the State Police, the Department of State Police. So you have the record from the hearing officer's proceedings and you have a record showing that this court, in error, you think, refused to review those

findings. So you have an adequate record to enable
the appellate court to decide your appeal.
MR. KONE: Yes, I agree with that point, Your Honor.
THE COURT: Okay. All right.
MR. KONE: But the same way, I would like to
again bring before you -
THE COURT: you're asking me to reconsider
my decision?
MR. KONE: Yes.
THE COURT: Okay. I'm not. I'm going to

let the record reflect that you made an oral

motion
to reconsider that decision, but I'm going to deny
that motion for the same reasons that led the Court
to sustain your motion to dismiss, and I'll note your
exception.

So now you are -- that issue is doubly preserved in the record, and you have, I think, a sufficient basis to argue to the appellate court that my decision to sustain the Department's motion to dismiss your appeal was erroneous.

MR. KONE: So, your Honor, the record

will
be transferred.

THE COURT: Correct. Yes. I don't think you need any statement of facts here.

MR. KONE: Yes. Yes, I agree. If you can reconsider, that's good.

THE COURT: All right.

Mr. Regnery, I'll ask you to prepare the order, please, reflecting that Mr. Kone appeared pro
se this morning, that you appeared as well representing the State Police on your objection to
the proposed statement of facts. The record should
reflect that you offered argument, Mr. Kone offered

argument, and that Mr. Kone expressed his agreement that a statement of facts was not necessary in this

case given that we have the recordings from the hearing officer's proceedings.

That he did ask the Court to reconsider the decision to sustain your original motion to dismiss.

That request was denied and his exception is noted.

And that on consideration of these matters,

your objection is sustained. And under Rule -- and the Court finds that a statement of facts is unnecessary. The parties are agreed that -- the representations are each party has agreed that it's unnecessary.

And that -- I'll entertain your suggestion as to how the order should conclude, whether this is, in fact, a certification in which under 5:11(d)(4) where I certify that the record is incomplete and that it lacks a statement of facts, but that it's

unnecessary. I don't know if that's the way you'd like to characterize the order, but it appears under -- do you have the rule there before you?

MR. REGNERY: Yes, I do.

THE COURT: You see under 4 -- excuse me, 5:11(d) the language is mandatory, it says the judge shall, and then it gives those alternatives? I'll entertain your suggestion as to how we would proceed.

MR. REGNERY: Well, Your Honor, 5:11(d) (i),

it talks -- in the first sentence, it says, under Objection, (as read) Any party may object to the transcript or written statement on the ground that it is erroneous or incomplete. I think that, at least as I heard the hearing today, we've agreed that the transcript -- there is no objection to the transcript.

THE COURT: Correct.

MR. REGNERY: That it is complete and contains the proceedings that were before t he hearing officer. If that were the case, then I would think

that there is no written statement any longer in front of the Court. Perhaps it can reflect that the parties have agreed that it's been --

THE COURT: Withdrawn.

MR. REGNERY: -- withdrawn and it is unnecessary.

THE COURT: All right. Why don't you characterize it that way. I think Mr. Kone agrees since we do have a transcript of the proceedings before the hearing officer, we do have an adequate record of those proceedings and the determinations

that he decides to challenge.

Is that correct, Mr. Kone?

MR. KONE: Yes, that's fine, Your Honor.

THE COURT: So you're withdrawing -- added to the record, it gives you the basis on which to pursue your appeal, you withdraw the effort to have a separate statement of facts in this court.

MR. KONE: That's fine, Your Honor.

THE COURT: Mr. Regnery, would you draft the order and submit it within ten days, please?

MR. REGNERY: Yes, Your Honor.

THE COURT: You can dispense with Rule 4:13, but please provide Mr. Kone with a copy of your proposed order and letter of transmittal.

Thank you both very much.

MR. KONE: Yes.

MR. REGNERY: Thank you, Your Honor.

(The hearing concluded at 9:38 a.m.)

COMMONWEALTH OF VIRGINIA,

COUNTY OF AMELIA, to wit:

I, LORI MCCOIN JONES, RPR, CCR, a Notary Public for the State of Virginia at Large, hereby certify that I, having been duly sworn, was the court reporter in the Circuit Court of the County of Chesterfield, Virginia, on June 29, 2009, at the time of the hearing

herein; further

that the foregoing is a true and accurate record of the testimony and other incidents of the hearing herein.

Given under my hand this 8th day of July, 2009.

/s/ Lori McCoin Jones

Lori McCoin Jones, RPR, CCR

Notary Public for the

State of Virginia at Large

Notary Registration #115740

My Commission expires:

January 31, 2012

21

22

23

24

25

Supreme Court, U.S.
FILED
FEB 1 - 2011
OFFICE OF THE CLERK

No. 10-642

In The
Supreme Court of the United States

PHANENDHARNADH L. N. KONE,

Petitioner pro se,

v.

VIRGINIA DEPARTMENT OF STATE POLICE,

Respondent.

On Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR REHEARING

PHANENDHARNADH L. N. KONE
Petitioner pro se
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PETITION FOR REHEARING

To the Honorable Judges of the Supreme Court of United States of America:

Pursuant to Rule 44.1 of the Rules of the Supreme Court of United States of America, petitioner pro se, Phanendharnadh L. N. Kone ("Kone") respectfully requests a rehearing from the decision of this Court rendered on January 10, 2011.

ARGUMENT

I. INFORMATION ABOUT PETITIONER PRO SE AND FACTS ABOUT THIS CASE

Petitioner pro se, Kone, was enrolled with MIT Professional Institute in 2008. Kone was enrolled in PhD in Information Technology with specialization in Information Security with the School of Business and Technology, Capella University. Kone holds a Master of Technology degree in Computer Science and Data Processing from Indian Institute of Technology, Kharagpur, West Bengal, India and a Bachelor of Technology degree in Electronics and Instrumentation Engineering from Kakatiya University, Warangal, Andhra Pradesh, India. Kone holds certificates from Community College Workforce Alliance (CCWA), CPI The Openfox Company, Ascend Communications, IBM, Checkpoint Software Technologies Ltd., Learning Management System (Virginia State Police) etc.

During Kone's employment with Department of State Police ("DSP") respondents produced wrong reports, wrong notices, falsified documents and forged documents.

Kone filed Grievance Form A (Rev. 8/14/2002) of Department of Employment Dispute Resolution ("EDR") on September 15, 2008 and advanced his grievance from first resolution step, second resolution step, third resolution step to qualification for hearing. EDR assigned an EDR Case number to Kone's grievance and the EDR case number is 8985. On December 16, 2008 at 7700 Midlothian Turnpike, Richmond, Virginia the EDR case number 8985 was heard by hearing officer. During the hearing respondents needed more time to think about the exhibits and their implementation. At the hearing on December 16, 2008 respondents evidence contained forged documents and falsified documents. Respondents failed to substantiate their thoughts with source code or process control objectives or logical reasoning. The transcript of hearing on December 16, 2008 reveals that respondents are not aware of technical standards and process flow. The transcript of hearing on December 16, 2008 is present in two audio tapes.

Hearing officer issued his decision on December 23, 2008. Kone requested hearing officer to reconsider his decision and Kone's request for reconsideration was received by EDR

on January 5, 2009. Hearing officer issued his response to reconsideration on January 8, 2009. On January 14, 2009 EDR Director received a letter from Kone requesting administrative review of the hearing decision in EDR Case Number 8985. On February 6, 2009 EDR Director issued a memorandum which is EDR Ruling No. 2009-2214.

On February 4, 2009 Kone filed Grievance Form A – Expedited Process with BASS of the Superintendent's office of the DSP. DSP forwarded Kone's Grievance Form A – Expedited Process to the EDR. On February 24, 2009 EDR Director issued a memorandum which is EDR Ruling No. 2009-2229.

On February 25, 2009 Clerk of the Circuit Court of Chesterfield County issued a Notice of Filing of Appeal with Case No. CL09-498.

When Kone informed the Circuit Court of Chesterfield County about the forged documents and falsified documents submitted by respondents, respondents failed to reply or rebut Kone's allegations about the forged documents and falsified documents.

II. DECISION OF HEARING OFFICER IS CONTRADICTORY TO LAW

During Kone's employment at DSP, Kone worked on network layers and application layers. Kone configured and administered systems and software. Kone wrote programs and the programs

written by Kone generated correct reports.

On the day of hearing i.e. December 16, 2008 all witnesses from DSP failed to substantiate their allegations with source code and best practices in information technology. All allegations from DSP are vague. On the day of hearing, all witnesses from DSP were silent or ignorant about the best practices or standards in information technology. Hearing officer failed to test and verify the credentials of witnesses submitted by DSP. Witnesses submitted by DSP were not qualified and competent to assess the performance of Kone.

During Kone's employment at DSP, DSP produced falsified documents and forged documents. Hearing officer relied on the falsified documents and forged documents. Obviously hearing officer's decision is wrong and the decision of hearing officer should be reversed.

If Kone's petition is not granted than there is no assurance that DSP will not repeat the practice of forging documents or falsifying documents against Kone.

III. THE COURT OF APPEALS ERRED IN IT'S MEMORANDUM OPINION PER CURIAM

The Court of Appeals erred in it's memorandum opinion per curiam on November 24, 2009, when it stated that:

> In addition, the issues appellant raised on appeal to the trial court involved evidentiary materials, witness competency and credibility matters, and the hearing officer's findings of fact, all of which were beyond the scope of review of the trial court pursuant to Code § 2.2-3006(B).

Virginia Code Ann. § 2.2-3006(B) does not restrict or limit Courts to obtain opinions from experts. Under Virginia Code Ann. § 2.2-3006(B) the Court can obtain opinions from experts or reverse the decision of hearing officer.

In page numbers 51-a2 to 53-a2 of the supplemental appendix under Complete transcript of the Testimony and other incidents, when heard before the Honorable Michael C. Allen, beginning at 9:00 a.m., Court said:

> I understand you object to this, you believe this court should have reviewed the evidentiary findings ---- of the hearing officer. And you have made that point and that is reflected in the record. Well, you have -- perhaps I should rephrase it. You have the hearing officer's recording so that that record that you challenge is before the Court of Appeals already. It's in the file, the recordings of the hearing officer's proceedings.

In page numbers 53-a2 to 55-a2 of the supplemental appendix under Complete transcript of the Testimony and other incidents, when heard before the Honorable Michael C. Allen, beginning at 9:00 a.m., Court said:

> So to the extent that you're asking the hearing officer to overturn this court's decision and you want to be able to refer – excuse me, you're asking the appellate court to overturn this Court's decision and you're going to ask the appellate court to review those findings and allow you to comment on them, you already have a record that enables you to do that because you have the recordings of the hearing officer. And you have this Court's order granting the motion to dismiss that was filed by the State Police, the Department of State Police. So you have the record from the hearing officer's proceedings and you have a record showing that this court, in error, you think, refused to review those findings. So you have an adequate record to enable the appellate court to decide your appeal.

In page number 56-a2 of the supplemental appendix under Complete transcript of the Testimony and other incidents, when heard before the Honorable Michael C. Allen, beginning at 9:00

a.m.. Court said:

> that issue is doubly preserved in the record, and you have, I think, a sufficient basis to argue to the appellate court that my decision to sustain the Department's motion to dismiss your appeal was erroneous.

The hearing officer in his decision wrote that his decision can be appealed. The Honorable Judge from the circuit court of Chesterfield county said that his decision to sustain DSP's motion to dismiss Kone's appeal is an error. So how can the Court of Appeals of Virginia or the Supreme Court of Virginia issue their opinions without hearing Kone?

The Court of Appeals of Virginia or the Supreme Court of Virginia never heard Kone and gave their opinions with errors. The opinions given by the Court of Appeals of Virginia or the Supreme Court of Virginia can cause irreparable damage to Kone.

IV. KONE WAS DEPRIVED OF ALL RESEARCH AND PRACTICAL USE OF SYSTEMS AND SOFTWARE IN PUBLIC SAFETY, PRECISE WEATHER MONITORING, HEALTH CARE ETC.

Kone produced substantial evidence of the unreasonableness of the respondents. Kone was deprived of all research and practical use of

systems and software in public safety, precise weather monitoring, health care etc., and has been discriminated against. Without further detailing the evidence it is clear that Kone has produced substantial evidence of the unreasonableness of the respondents, hearing officer and EDR Director. DSP produced no evidence of the reasonableness of its action. In fact the only evidence that respondents introduced were the falsified documents and forged documents.

CONCLUSION

Kone requests the Court to grant this petition to rehear and enter final judgment in favour of Kone.

Under Virginia Code Ann. § 2.2-3006(B) the Court can reverse the decision of hearing officer. Kone requests the Court to reverse the decision of hearing officer.

Kone requests that the final order of the Circuit Court of Chesterfield County be reversed and the case remanded with instructions for entry of decree to provide respondents to withdraw their decisions against Kone and award costs to Kone under the present Virginia Code Ann. § 2.2-3006(E).

Respectfully submitted,

Phanendharnadh L.N. Kone

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Date: February 1, 2011

CERTIFICATE OF PETITIONER PRO SE

Pursuant to Rule 44.2 of the Rules of the Supreme Court of United States of America I believe that this petition for rehearing is meritorious and I hereby certify that this petition is presented in good faith and not for purposes of delay.

Phanendharnadh L.N. Kone

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Date: February 1, 2011